Eckhardt Marine GMBH v Sheriff, High Court of Malaya, Seremban & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–01–24 OF 1999

GOPAL SRI RAM, NH CHAN AND HAIDAR JJCA

12 OCTOBER 1999

Contract *— Offer and acceptance — Conditional contract — Appellant sent conditional offer and deposit to respondent in response to latter's advertisement of vessel for sale — Whether respondent had accepted appellant's offer thereby creating valid and binding contract — Letter from appellant's agent to respondent acknowledging latter's acceptance of appellant's offer*

Contract *— Offer and acceptance — Formation — Respondent advertised vessel for sale — Appellant sent conditional offer and deposit to respondent in response to advertisement — Failure by appellant to pay remainder of purchase price by stipulated date — Whether offer and acceptance between appellant and respondent creating valid and binding contract — Whether judge below correct in finding existence of valid and binding contract*

The sheriff of the Seremban High Court had arrested a motor vessel at Port Dickson and later put it up for sale by way of an advertisement. The appellant sent an offer to the sheriff together with a letter and a banker's draft for 10% of the purchase price. The letter made it clear that the offer was on the sheriff's terms, but subject to two conditions: that the port authority did not require any repairs to be done to the vessel and that the vessel could leave on its own power on the basis of a seaworthiness certificate issued by an appointed surveyor of the underwriters. The sheriff accepted the appellant's offer, which was below the advertised price, and took out a summons seeking leave of the judge to conclude the sale. The judge directed the sheriff to take steps to ensure that the conditions attached to the appellant's offer were satisfied. The sheriff made the relevant inquiry. The result was a reply from the Marine Department at Port Klang, which satisfied the two conditions imposed by the appellant. The judge then approved the sale and the appellant became obliged to pay the balance of the purchase price within the time stipulated, but it failed to do so and its deposit was forfeited. It then applied to the judge for the release of the deposit, alleging that no binding contract had been concluded between the parties. The judge held against the appellant. The issue on appeal was whether there was a valid and binding contract between the appellant and the sheriff of the High Court at Seremban.

Held, dismissing the appeal:

(1) There was no doubt that the sheriff's advertisement amounted to an invitation to treat. It was the appellant who had made a conditional offer by way of its letter in question. The sheriff had clearly accepted the appellant's offer by words and by conduct. He had applied to the judge for leave to sell and ensured

satisfaction of the appellant's conditions by obtaining confirmation from the relevant authority. The judge had undertaken a careful scrutiny of the evidence and had come to the conclusion that there was a valid and binding contract between the parties. No error was detected in his reasoning and there was no difficulty in upholding his judgment (see p 54D–E).

(2) There was an additional reason for upholding the judgment below: the appellant itself had taken the position that there was a concluded contract. This much appeared clearly from appellant's agent's letter of 16 February 1998 addressed to the sheriff. The appellant had, through its authorized agent, clearly acknowledged that its offer had been accepted by the sheriff and was, therefore, estopped from denying that there was a valid and binding contract between it and the sheriff (see p 54F–H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchanr Bank Bhd* [1995] 3 MLJ 331 followed.

[Bahasa Malaysia summary

Sherif Mahkamah Tinggi Seremban telah menahan sebuah kapal bermotor di Port Dickson dan kemudian meletakkannya untuk dijual melalui satu iklan. Perayu telah menghantar satu tawaran kepada sherif bersama sepucuk surat dan draf bank untuk 10% daripada harga jualan. Surat tersebut dengan jelas menyatakan bahawa tawaran tersebut adalah berdasarkan terma-terma sherif, tetapi tertakluk kepada dua syarat: bahawa pihak berkuasa pelabuhan tidak menghendaki apa-apa pembaikan dibuat kepada kapal tersebut dan bahawa kapal tersebut boleh berlepas dengan kuasanya sendiri berdasarkan sijil kelayaklayaran yang dikeluarkan oleh seorang juruukur yang dilantik kepada penaja jamin tersebut. Sherif tersebut telah menerima tawaran perayu, yang kurang daripada harga yang diiklankan, dan memulakan satu saman untuk memohon kebenaran hakim untuk menyempurnakan jualan tersebut. Hakim telah mengarahkan sherif tersebut untuk mengambil langkah-langkah bagi memastikan agar syarat-syarat yang disertakan dengan tawaran perayu telah dipuaskan. Sherif tersebut telah membuat siasatan yang berkaitan. Hasilnya adalah satu jawapan daripada Jabatan Peikanan di Pelabuhan Klang, yang memenuhi dua syarat yang dikenakan oleh perayu. Hakim kemudiannya telah meluluskan jualan tersebut dan perayu mempunyai obligasi untuk membayar baki harga jualan dalam tempoh yang ditetapkan, tetapi ia gagal berbuat demikian dan depositnya telah dirampas. Ia kemudiannya telah memohon kepada hakim tersebut untuk melepaskan deposit tersebut, dengan mengatakan bahawa tiada kontrak yang mengikat yang telah disempurnakan antara pihak-pihak tersebut. Hakim tersebut telah membuat keputusan menentang perayu tersebut. Persoalan yang dirayukan adalah sama ada terdapat satu kontrak yang mengikat antara perayu dan sherif di Mahkamah Tinggi di Seremban.

Diputuskan, menolak rayuan tersebut:

(1) Tidak boleh diragukan bahawa iklan sherif tersebut membentuk satu pelawaan tawaran. Perayu telah membuat tawaran bersyarat tersebut melalui surat yang dipersoalkan. Sherif telah dengan jelas menerima tawaran perayu melalui perkataan dan perbuatan. Beliau telah memohon kepada hakim untuk kebenaran menjual dan memastikan syarat-syarat perayu dipenuhi dengan mendapatkan pengesahan daripada pihak berkuasa. Hakim telah menjalankan satu penelitian yang berhemat dan telah tiba kepada kesimpulan bahawa terdapat satu kontrak yang sah dan mengikat antara pihak-pihak tersebut. Tiada kesilapan ditemui dalam pertimbangan beliau dan tiada kepayahan dalam mengesahkan penghakiman beliau (lihat ms 54D–E).

(2) Wujud sebab tambahan untuk mengesahkan penghakiman di bawah: perayu sendiri telah mengambil keputusan bahawa terdapat satu kontrak yang telah disempurnakan. Ini amat jelas dalam surat ejen perayu bertarikh 16 Februari 1998 yang dialamatkan kepada sherif. Perayu telah, melalui ejennya yang diberi kuasa, dengan jelas mengakui bahawa tawarannya telahpun diterima oleh sherif tersebut dan telah, oleh demikian diestopkan daripada menafikan bahawa terdapat satu kontrak yang sah dan mengikat antaranya dan sherif tersebut (lihat ms 54F–H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchanr Bank Bhd* [1995] 3 MLJ 331 diikut.]

Notes

For cases on offer and acceptance generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3385–3389.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (folld)
Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 (refd)
Financings Ltd v Stimson [1962] 3 All ER 386 (refd)
Gibbons v Proctor (1891) 64 LT 594 (refd)
Gibson v Manchester City Council [1978] 2 All ER 583 (refd)
Gibson v Manchester City Council [1979] 1 All ER 972 (refd)
Lefkowitz v Great Minneapolis Surplus Store (1957) 251 Minn 188 (refd)
Partridge v Crittenden [1968] 2 All ER 421 (refd)

Appeal from: Admiraliti in Rem No 27–2 of 1997 (High Court, Seremban)

K Anantham (*Nacheal Khana* with him) (*Skrine & Co*) for the appellant.
Jainil Bhandari (*KM Chye & Partners*) for the second respondents.
Nagarajah Muttiah (*Shook Lin & Bok*) for the third respondent.

Gopal Sri Ram JCA. (delivering judgment of the court): The short question in this appeal is whether there was a valid and binding contract between the appellant and the sheriff of the High Court at Seremban. The learned judge of the High Court held that there was. After hearing arguments we agreed with him and dismissed the appeal. The reasons for our decision are now produced.

The facts are fairly simple. The sheriff of the Seremban High Court arrested a motor vessel at Port Dickson known as 'Mount I'. He later put it up for sale. It was by way of an advertisement. The sale was on the sheriff's terms and conditions and on an 'as is where is' basis. The sale included the bunkers and lubricating oil. The appellant wanted to buy the vessel. It made an offer. The offer was sent to the sheriff, under cover of the appellant's letter dated 12 February 1998, together with a banker's draft for 10% of the purchase price. The letter made it clear that the offer was on the sheriff's terms, but subject to certain conditions. One condition was that the port authority did not require any repairs to be done to the vessel. The other condition was that the vessel could leave on its own power on the basis of a seaworthiness certificate for one ballast voyage to Chittagong issued by an appointed surveyor of the underwriters. The sheriff accepted the appellant's offer. As the appellant's offer was below the advertised price, the sheriff took out a summons seeking leave of the judge to conclude the sale. The learned judge then correctly directed the sheriff to take steps to ensure that the conditions attached to the appellant's offer were satisfied. The sheriff made the relevant inquiry. The result was a reply from the Marine Department at Port Klang, which in essence satisfied the two conditions imposed by the appellant. The judge then approved the sale. The appellant then became obliged to pay the balance of the purchase price within the time stipulated, but it failed to do so and its deposit was forfeited. It then applied to the judge for the release of the deposit, alleging that no binding contract had been concluded between the parties. The learned judge held against the appellant and hence this appeal.

Before considering the correctness of the learned judge's findings that have been attacked before us by Mr Ananthan, counsel for the appellant, we think it appropriate to utilise this opportunity to set out the propositions of law that govern this area.

First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. In other words, whether the agreement in question may be resolved into an offer and a corresponding acceptance. That such an approach should be generally adopted was affirmed by the House of Lords in *Gibson v Manchester City Council* [1979] 1 All ER 972. In the Court of Appeal, Lord Denning MR had suggested quite a different test. The decision of the Court of Appeal is reported in *Gibson v Manchester City Council* [1978] 2 All ER 583. The relevant passage is at p 586. This is how the learned Master of the Rolls put it:

> We have had much discussion as to whether Mr Gibson's letter of 18 March

> 1971 was a new offer or whether it was an acceptance of the previous offer which had been made. I do not like detailed analysis on such a point. To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so; but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through. For that proposition I would refer to *Brogden v Metropolitan Railway Co.*

This approach was rejected by the House of Lords. We find it sufficient to quote from the speech of Lord Diplock at p 974:

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

Second, there are a number of guidelines — we emphasise that these are only guidelines — that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers. *Gibbons v Proctor* (1891) 64 LT 594 and *Partridge v Crittenden* [1968] 2 All ER 421 are illustrative of the general rule. The American case of *Lefkowitz v Great Minneapolis Surplus Store* (1957) 251 Minn 188 provides the contradistinction. In that case, the defendant store published an advertisement that read 'Saturday 9am sharp three brand new fur coats worth to $100. First come first served $1 each.' On each of the Saturdays following the publication of the advertisement, the plaintiff was the first to present himself at the appropriate counter in the defendant's store. On each occasion, he demanded the coat and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff on the ground that it was a 'house rule' that the offer was intended for women only. The Municipal Court of Minneapolis found for the plaintiff. The defendant appealed. The appellate court, in dismissing the appeal, held that the advertisement constituted an offer that had been accepted by the plaintiff. Murphy J delivered the judgment of the court. He said:

> Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the

> parties and the surrounding circumstances. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality obligation to constitute a contract of sale.

Third, an offer may be made unconditionally or upon stated conditions. In the latter case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather elementary propositions, it may be found in *Financings Ltd v Stimson* [1962] 3 All ER 386.

Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666 is a case of acceptance by conduct.

So much for what we consider to be the applicable law.

In the present instance, there is no doubt that the sheriff's advertisement amounted to an invitation to treat. It is the appellant who made a conditional offer by way of its letter in question. The sheriff clearly accepted the appellant's offer. He did so by words and by conduct. He applied to the judge for leave to sell. He ensured satisfaction of the appellant's conditions by obtaining confirmation from the relevant authority. The learned judge undertook a careful scrutiny of the evidence and came to the conclusion that there was a valid and binding contract between the parties. We were unable to detect any error in his reasoning and we found no difficulty whatsoever in upholding his judgment.

There is, however, an added reason for upholding the judgment appealed against. It is that the appellant itself took the position that there had been a concluded contract. That much appears clearly from appellant's agent's letter of 16 February 1998, addressed to the sheriff. The second paragraph of that letter reads as follows:

> May we, on behalf of our principals Messrs Eckhardt Marine GMBH of Hamburg, Germany, thank you very much for accepting our bid for purchase of the said vessel and we await your news on the judge's approval.

In our judgment, the appellant through its authorised agent clearly acknowledged that its offer had been accepted by the sheriff and is, therefore, estopped from denying that there is a valid and binding contract between it and the sheriff. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchanr Bank Bhd* [1995] 3 MLJ 331.

After having carefully considered the arguments advanced for the appellant and after carefully examining the material in the appeal record provided to us, we were of the unanimous view that this appeal could not succeed. Accordingly, the appeal was dismissed. The orders made by the learned judge in the court below were affirmed. The appellant was ordered to pay the costs of the appeal. The deposit in court was ordered to be paid

out to the second respondent. Additionally, the second respondent was given general liberty to apply to the High Court for such directions as may be necessary.

Appeal dismissed.

Reported by Anita Teo